Supreme Court, U.S.
FILED
JUL 31 1991
OFFICE OF THE CLERK

(2)

No. 91-68

In The

Supreme Court of the United States

October Term, 1991

ROMAN A. GROCHOWSKI,

Petitioner,

vs.

T.S. DEWITT-RICKARDS,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Respondent, pursuant to Rule 34.1(a) and .2 of the Rules of the Supreme Court of the United States, asserts that petitioner's statement of questions presented is misleading and confusing, and offers the following alternative:

Did the Fourth Circuit Court of Appeals err in ruling that there was no violation of the Fourth, Fifth or Fourteenth Amendments to the United States Constitution where the force used by respondent to extract from petitioner breath analysis evidence of intoxication, pursuant to the Virginia statutory scheme, caused no more than minor discomfort to petitioner?

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STATEMENT OF CASE

Petitioner Grochowski filed his Complaint on August 25, 1989, alleging that respondent Dewitt-Rickards, a police officer for the City of Charlottesville, Virginia, violated his rights protected by the Fourth, Fifth and Fourteenth Amendments during an arrest for driving while intoxicated. Grochowski alleged that

he had a statutory right to refuse a breath analysis of blood alcohol, but that respondent coerced by excessive force Grochowski's submission to the breathalyzer.

Respondent answered and filed an affidavit from the Commonwealth attorney including Grochowski's traffic trial testimony and the record of appeal of his criminal conviction, which conviction was upheld in the state appeals court. The federal district court granted summary judgment for respondent, holding that the criminal conviction required a finding that the evidence was not unconstitutionally collected, thereby collaterally estopping the civil action. The Court of Appeals disagreed, but held that summary judgment for respondent nonetheless was appropriate on the merits.

The Fourth Circuit held that Grochowski consented to a breathalyzer test after being detained on suspicion of driving while intoxicated (Appendix to Petition at 14). He was taken to the stationhouse for purposes of the test without violent incident (Petition at 8).

At the stationhouse, Grochowski fell while stepping from the police car, through no fault or cause of the officers, injuring his head (P9). After the breathalyzer was set up, warmed up, and the test was in progress, Grochowski declared he would rather go to the hospital for a blood test (App. 14). The officers declined the request, held Grochowski in a chair, and admonished him to blow into the machine (App. 15). During the test, the machine's lid twice fell on Grochowski's head, although there is no allegation he was thereby injured (P10). The blood alcohol reading was .11, in excess of the statutory limit of .10. (App. 21).

The Court of Appeals, even resolving all factual disputes in Grochowski's favor (App. 11), found that Grochowski voluntarily consented to the breath analysis. The "minor force" used by

respondent caused no more than "minor discomfort on the part of the complaining party." (App. 12, 13).

Respondent urges upon this Court that the unpublished opinion of the Court of Appeals properly applied the facts and the law, that the court below decided no federal questions in a way in conflict with applicable decisions of this Court, and that the Petition filed herein should be denied.

REASON FOR DENYING THE PETITION

THE FORCE ALLEGEDLY EMPLOYED BY RESPONDENT WAS NOT UNCONSTITUTIONALLY EXCESSIVE.

Grochowski brings his action pursuant to 42 U.S.C. § 1983, claiming that his constitutional rights were violated following his detention for driving while intoxicated and the subsequent administration of a breathalyzer examination to confirm intoxication. The appropriate standard to review respondent's actions depends upon the particular constitutional right allegedly infringed by the application of excessive force. *Graham v. Connor,* 490 U.S. 386 (1989). The Petition fails to distinguish clearly each right and standard implicated in this case.

Petitioner claims that his detention by police and submission to a breathalyzer test violated his Fourteenth Amendment due process rights, because excessive force was used to coerce the test. He argues that the police conduct should be reviewed with respect to "whether or not the police actions impermissibly encumbered Grochowski's legislated right of refusal." (P22). This is not a constitutional issue.

A state legitimately may compel a driver to submit to a blood-alcohol test against his will. *South Dakota v. Neville,* 459 U.S.

553, 563 (1983). The Fourteenth Amendment is not implicated unless the method used to extract the evidence offends that "sense of justice" described in *Rochin v. California,* 342 U.S. 165 (1952). In the instant case, Grochowski elected to take the test, "never voiced a blanket refusal to submit to any test," and only requested a blood test after the breathalyzer lid fell on his head (App. 16-17). Since Grochowski was not forced to take the test, there was no need to engage in Fourteenth Amendment analysis of the degree of force.

Even applying due process analysis, the police activity involved cannot be characterized as "inappropriate force."[1] *See Schmerber v. State of California,* 384 U.S. 757, 760, n. 4 (1966). Further, given a specific Fourth Amendment challenge to the force alleged, a more generalized due process analysis is inappropriate. *See Graham,* 490 U.S. at 394.

Grochowski seems to concede that the Fifth Amendment confers no constitutional right to be free from a breathalyzer test for driving while intoxicated. He instead argues that the Fifth Amendment is implicated through the Fourth Amendment if the police, in taking him into custody and administering the test to collect evidence, employ excessive force.

Grochowski did not articulate below the *Graham* standard he now contends should have been employed. In his brief to the Court of Appeals he argued that he was "compelled" by the police to submit to the test, by their admonitions to "blow, blow, blow," in violation of the Fifth Amendment. He further argued that the test was not administered in a "reasonable manner," citing *Schmerber, supra,* but not *Graham.* He should not be allowed

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1. For due process clause purposes, "inappropriate" force is that which "shocks the conscience" and offends "even hardened sensibilities." *Rochin v. People of California,* 342 U.S. 165, 169-72 (1952).

to petition this Court to review a decision below on grounds different from those upon which he previously relied. *Youakim v. Miller,* 425 U.S. 231, 234 (1976).

Regardless, the decision of the Court of Appeals should stand. Factually, the court had before it the affidavit of the Commonwealth's attorney and the criminal trial testimony of Grochowski and the respondent officer. Grochowski relied upon the mere allegations of his pleadings. *See* F.R.C.P. 56(e). "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial." *Matsushita Elec. Indust. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587 (1986).

The facts in this case simply could not lead to a verdict for petitioner. Those facts plainly contradict the claim of a violation of the *Graham* "objective reasonableness" test. Grochowski does not allege that the seizure of his person for driving under the influence of alcohol was accompanied by force. Nor does he allege that the respondent pushed, tripped or otherwise caused him to fall at the time of arrival at the stationhouse. He did fall, but concedes it was independent and accidental (P9). All he alleges is that the officers held him in a chair at the breathalyzer machine, admonished him to blow into it, and in the process the wooden lid of the machine accidentally fell on his head. "There is no evidence tending to show that the lid was purposely dropped on his head." (App. 15).

Assuming that the Fourth Amendment even attaches to the breathalyzer test, administered after Grochowski was non- violently taken into custody,[2] there was no evidence of excessive force.

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2. *Graham v. Connor,* 490 U.S. at 395, n. 10 specifically reserves the "question whether the Fourth Amendment continues to provide individuals with protection against the deliberate use of excessive physical force beyond the point at which arrest ends and pretrial detention begins."

As this Court stated in *Graham*:

> The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight . . . .
>
> "Not every push or shove, even if it may later seem, unnecessary in the peace of a judge's chambers" . . . .violates the Fourth Amendment . . . .
>
> As in other Fourth Amendment contexts . . . the "reasonableness" inquiry in an excessive force case is an objective one: the question is whether the officers' actions are "objectively reasonable" in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.

490 U.S. at 396, citations omitted.

In determining whether conduct is so "unreasonable" as to be unconstitutional, "we must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." *Tennessee v. Garner*, 471 U.S. 1, 8 (1985). This Court has already recognized the compelling interest in highway safety, especially in the context of the drunk driver. *See South Dakota v. Neville*, 459 U.S. 553 (1983); *Mackey v. Montrym*, 443 U.S. 1 (1979); *Breithaupt v. Abram*, 352 U.S. 432 (1957).

Just as the governmental interest is compelling, the nature and quality of the intrusion against Grochowski was *de minimus*.

The circuit courts, before and after *Graham*, have recognized that, to be unconstitutional, the force and injury must be severe. *See, e.g., Dean v. City of Worcester,* 924 F.2d 364 (1st Cir. 1991) (where plaintiff was pushed face-first onto sidewalk, gun placed to his ear, feet kicked, he was tightly handcuffed, then pushed against a wall causing him to suffer a cut to his scalp, summary judgment was affirmed for the police officers); *Foster v. Metropolitan Airports Com'n,* 914 F.2d 1076 (8th Cir. 1990) (pushing plaintiff against a wall twice while handcuffed not so unreasonable as to give rise to a constitutional claim of excessive force); *Raley v. Fraser,* 747 F.2d 287 (5th Cir. 1984) (even where police applied choke holds four times, plaintiff's "arms were bruised, his face scraped, and the handcuffs raised welts on his wrists," force used was not unreasonable).

The Fifth Circuit has held that a plaintiff can prevail on a constitutional excessive force claim only by proving each of three elements:

> (1) a significant injury, which
>
> (2) resulted directly and only from the use of force that was clearly excessive to the need; and the excessiveness of which was
>
> (3) objectively unreasonable.

Johnson v. Morel, 876 F.2d 477, 480 (5th Cir. 1989). Applying this test to Grochowski's arrest, it is evident that he did not suffer a significant injury.[3] Indeed, there was no injury from the wooden

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3. Even if the concussion petitioner allegedly suffered were significant, which respondent denies, it did not result from any force exerted by respondent, but rather occurred when Grochowski accidentally and independently fell.

lid of the breathalyzer, and no evidence that respondent caused it to strike Grochowski. Thus, respondent's conduct could not be unreasonable.

CONCLUSION

The Fourth Circuit Court of Appeals correctly granted summary judgment for the respondent Officer DeWitt-Rickards. There is no evidence of excessive or unreasonable force resulting in significant injury to Grochowski. There is no constitutional issue worthy of review by the Supreme Court of the United States. The Petition should be denied, and final judgment entered for respondent.

Respectfully submitted,

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